A FIDUCIARY CLIENT IS DIFFERENT

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I. TYPES OF FIDUCIARIES

A. Conservatorship and Guardianship

1. A simple 3 Page Petition (can have attachments) is filed in Probate Court.

2. The basic standard of both is whether, based upon established physical or mental conditions, the individual is unable to manage their medical issues, care, assets or business affairs.

3. A guardian only deals with a person's medical, home and day-to-day care needs. The only finance they may handle is Social Security.

4. You may likely have more contact with Conservators, think of them as Powers of Attorney supervised by the Probate Court.

5. They handle a person's finances, assets, debts, taxes and sometimes business affairs that are in that person's name only- Trust or jointly titled assets are handled by someone else, normally.

6. While there may be doctor letters, expert witnesses or family and friends all supporting the request, if the person objects, the Judge will make the decision and if granted, supervises at least annually the case until that person passes away.

   There are annual Court filings, served on the family, that summarize all the finances or as applicable, the personal/medical yearly activity.

B. Powers of Attorney

1. This is a document that is signed before a person is incapacitated and is effective outside the Probate Court realm.

2. These come in all shapes and sizes, from the formerly known “drug store” form, to a Staples office supply form, to an “online form”, to one drafted by a competent law firm like Maddin Hauser and the Center for Estate Planning…

3. Often, Powers of Attorney, a/k/a Durable Powers of Attorney, are good, valid and usable the day they are signed, that is what you will see the most as a tax planner on behalf of an individual taxpayer.

4. Sometimes, as we also see in Trusts, the Power is only effective upon the occurrence of a described condition or circumstance.

5. Sometimes two doctors must recite a stated benchmark, sometimes one doctor, these unfortunately don’t always match up with other incapacity legal standards- fodder for Probate litigators like myself.

6. You must review the document to confirm the person you are dealing with has the legal authority.

C. Personal Representatives

1. Another fiduciary you may deal with is a Personal Representative, formerly known as an Executor/Executrix.

2. This is a three-page Probate filing that can include submission of a person’s last Will and Testament.

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3. This is a proceeding commenced by the inability to address some assets or circumstances in the name of the decedent only-Trust/Joint title/beneficiary accounts not typically part of Probate.

4. A Personal Representative must account, to the Court and heirs, like in other Probate, often can include financial information you help provide.

D. Trustees

1. They act based upon what the Trust document sets forth is a springing event.

2. It is often the death of the initial Grantor/Trustee.

3. The triggering event, if that person is still alive, will also often vary depending on the stated medical benchmarks/standards and enumerated conditions stated in the Trust.

4. This Successor Trustee appointment component is also used to remove/surcharge/suspend or otherwise deal with possible breach of Fiduciary duties.

II. LEGAL LANDMINES

A. A former longtime client will call - you already know they have a fiduciary in place.

1. Your communications with them, other than being respectful, are different than before.

2. Your client is now a fiduciary, not the individual client.

3. How extensive that communication can go must be authorized by the fiduciary client and very carefully addressed with the actual, now former client.

B. A family member/heir at law/Special Fiduciary/GAL (Guardian ad Litem) contacts or subpoenas you related to information or data within your knowledge that they are investigating or received as part of an annual accounting- Your client again must authorize any release or response to this type of Third-party request.

C. Conflicts of interest come in shapes and sizes in the world.

1. As to a former client, he may be in conflict with his own family member- who is now their fiduciary.

2. It should be no different than before, what is in the client's best interest should and usually prevails.

D. This now leads to the final remarks about legal landmines- the fiduciary client who you know is doing wrong.

1. This often starts with other family who are in a legal fracas trying to get you to line up with them.

E. It's very important to deploy CYA efforts so you don't get sucked into the legal or ethical quagmire.